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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EDGAR RENE SOLORZANO, Defendant and Appellant.	B216799 (Los Angeles County Super. Ct. No. GA069777)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dorothy L. Shubin, Judge. Affirmed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

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Edgar Rene Solorzano appeals from the judgment entered upon his convictions by jury of rape by drugs (Pen. Code, § 261, subd. (a)(3), count 1)[1] and sexual penetration by foreign object (§ 289, subd. (e), count 4). The trial court sentenced him to an aggregate prison term of eight years. Appellant contends that (1) there was insufficient evidence to support his convictions, (2) the trial court erred (a) in allowing the admission of evidence of prior uncharged sexual conduct, thereby depriving him of his rights to due process and a fair trial, (b) in refusing to allow the defense a full and fair cross-examination of the victim's history of alcohol consumption, thereby depriving him of his constitutional rights to confront the witnesses against him, present a defense, due process and a fair trial, and (c) in excluding two defense witnesses, depriving appellant of his rights to present a defense, assistance of counsel, due process and a fair trial, and (3) execution of sentence on count 4 should be stayed pursuant to section 654.

We affirm.

FACTUAL BACKGROUND

The prosecution's evidence

The charged offenses

In February 2007, 18-year-old Jacqueline Z. worked at Starbucks, where appellant frequented. She served and talked with him on the job. Appellant often gave Starbucks employees free suite tickets to Dodger games. Jacqueline went to the games using the free tickets twice, but at the invitation of Starbucks employees, who had obtained them from appellant. Appellant also attended those games. Jacqueline never went alone with him.

On February 19, 2007, appellant sent Jacqueline several text messages asking if she wanted to go out later for drinks with him and his friends. She had given him her number so he could give her tickets. Appellant said he knew a bar where she would not get carded, so she agreed. She did not think she was going to be alone with him and had no romantic interest in him.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

They met at Starbucks, and Jacqueline got into appellant's car. During the drive to a restaurant in Pasadena, they chatted. Appellant said he was 27 years old, though he was 39. He also said that the ring he was wearing looked like a wedding band but was a class ring. He gave no indication he was romantically interested in her.

At the restaurant, they sat at the bar, and appellant ordered two bottles of beer. Jacqueline drank about half of her bottle. Because the restaurant was loud, after one-half hour, he asked her if she wanted to go elsewhere so they could talk. She agreed, and they left.

Appellant drove to a grocery store where he purchased plastic cups, soda and vodka. He then drove to his office building, arriving near 9:15 p.m. They went into another employee's office where Jacqueline turned on the stereo, while appellant poured drinks, filling the 16-ounce cups. She was not looking at him while he did so, though she told officers that she saw him pour the drinks. The drinks did not taste too strong but more like soda. She did not object to drinking alcohol.

Approximately one-half hour later, after Jacqueline drank at most one-third of her drink, she walked to the bathroom down the hall, beginning to feel "weak and numb." It became difficult for her to stand up. As she walked back to the office, the numbness increased, forcing her to use the wall to support herself. Her vision became blurry. Jacqueline had occasionally drank vodka before, but had never passed out or experienced a similar reaction.

When Jacqueline returned to the office and sat down, appellant grabbed her head and tried to kiss her face with his tongue. She pushed him away. He tried again. Jacqueline's arms felt heavy, and she had no energy. She ended up on her back on the floor, with appellant on top of her, lifting her sweater and bra and kissing her breasts. She remembered nothing after that. She did not consent to appellant's sexual advances and did not want to have sex with him.

At approximately 4:00 a.m., Jacqueline woke up in the driver's seat of her car in the Starbucks's parking lot, fully dressed. Her purse was next to her, and her keys were inside. The text messages with appellant on her cell phone were gone. She had no

energy and could not focus her eyes. It required all of her energy to drive slowly home. At her house, she literally crawled to her room and into bed. She awoke at 9:00 a.m., experiencing some pain in her anal and genital areas. She had a small bruise on her hip and a bump on her head. She showered and put the clothes she was wearing in the washing machine. She tried unsuccessfully to phone appellant to find out what had happened.

At 12:38 p.m., Jacqueline spoke with appellant on the phone. He said that he had had vaginal sex with her without a condom and inserted a little of his finger in her anal region, but they did not have anal sex. Appellant said that he put her in her car near 12:30 a.m.

On February 21, 2007, Jacqueline went to the Pasadena Police Department, where she had two recorded pretext phone conversations with appellant.[2] She gave the police the clothes she was wearing while with appellant, identified the places he took her, and went for a sexual assault examination, arriving there at approximately 10:00 or 11:00 p.m. She was not seen by the nurse until 5:00 a.m.

The investigation

Cari Caruso, a certified sexual assault nurse, examined Jacqueline. Caruso observed that there was a small bruise on Jacqueline's right shoulder, a small, faint abrasion on her right temple, and a bump near her ear. Caruso took swabs of the external area of the vagina, the internal vaginal area, obtained with a speculum, and the anal area. The vaginal examination revealed redness, scattered abrasions, red spots and a tear, "at 6:00 o'clock" at the fossa naviculare, and a thick, white, "curd-like" plaque discharge. There were scratches in the anal area.

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[2] In the first conversation, appellant said that he did not have any sexually transmitted diseases, did not use a condom and did not have anal sex with Jacqueline. He said she consented to sex and undressed herself. He denied that he put anything in her drink.

In the second conversation, among other things, appellant claimed Jacqueline had a lot to drink.

Caruso explained that all of her observations could have been caused by something other than intercourse, such as a yeast infection. The redness is nonspecific and can be the normal appearance of the vagina. Tears are a common finding after intercourse. Though the scratches on the anus could have been from digital penetration, they also could have had nothing to do with sex. Caruso's findings were equally consistent with consensual sex as with nonconsensual sex.

On March 21, 2007, appellant was served with a search warrant at his Alhambra home. When he received the warrant, he said, "I have a feeling I know what this is about." Later that day, he gave a recorded statement to police. He said that he did not know Jacqueline was under age. They went to his office and were kissing each other. He learned then that she was only 19 years old, but she had already been drinking. Jacqueline took off her clothes, and he performed oral sex on her and played with her anus with his finger. He also had vaginal sex with her. He ejaculated on her stomach, not inside of her. Appellant denied putting any drugs in her drinks and that Jacqueline pushed him away. If she had told him to stop, he would have. During the search, officers took appellant's computer to determine if he had information on it regarding date-rape drugs. They found nothing incriminating.

Forensic evidence

Sean Yoshii, supervising Los Angeles County Sheriff's Department criminalist, examined Jacqueline's clothing and vaginal, anal and external genital samples taken by Caruso for the presence of semen or saliva. No conclusive evidence of semen was detected. The anal sample showed the presence of saliva. The samples were sent for further DNA analysis by senior criminalist, Cindy Carroll. She found a "partial profile" of "at least two male donors" in Jacqueline's mixture sample that "could not exclude" appellant as "a possible contributor to that mixture profile."

Cynthia Morris-Kukoski, an FBI forensic examiner, and Vina Spiehler, a forensic pharmacologist, gave expert testimony on date-rape drugs. Kukoski testified that benzodiazepines are a class of drugs used to treat seizures, as sleeping pills and before general surgical procedures. The particular type of date-rape drug affects the ability to

detect its presence 52 hours after usage, and each date-rape drug has its own unique dosage level.

Rohypnol is a benzodiazepine drug and is illegal in the United States. Its symptoms include sedation, sleep, dizziness, blurry vision, anterograde amnesia, and difficulty walking and moving the arms. Depending upon the dosage, its symptoms occur about 30 minutes to an hour after ingestion, and the effects can last up to 12 hours. Drinking alcohol with Rohypnol has a synergistic effect. Drinking alcohol with Prozac has a similar effect, but Jacqueline, who had been taking Prozac with a prescription, claimed to have stopped taking that drug weeks before the charged incident.

Kukoski testified that she would expect to find evidence of a date-rape drug in the blood for up to 24 hours and in urine for up to 96 hours. Urine is the best test for the presence of that type of drug. She would expect that a specimen taken 50-52 hours after ingestion would reflect evidence of a date-rape drug, except for alcohol and Gammahydroxybutyrate (GHB), a non-benzodiazepine date-rape drug that is present in the body endogenously, which would not be evident in urine after 8-12 hours. When ingested, benzodiazepines, including Rohypnol, can also get into the user's hair and remain there until the hair falls out or is cut. Kukoski evaluated Jacqueline's hair samples for Rohypnol. Those tests were negative.

Spiehler also testified to the effects of Rohypnol. Like other benzodiazepine drugs, the effects were dependent on the quantity taken. Spiehler agreed with Kukoski that alcohol enhances its effects, which appear between 15 and 30 minutes after ingestion. The larger the dose the quicker the onset. Rohypnol is flushed from the body in approximately three days, but remains in the hair much longer. The quantity in the hair depends on the dosage. Spiehler criticized the prosecution expert's analysis of Jacqueline's hair because there was no information on the rapidity of Jacqueline's hair growth, and the analysis targeted Rohypnol, which would not have found other benzodiazepines. Spiehler would expect to see Rohypnol in the blood for three days.

Spiehler opined that the symptoms exhibited by Jacqueline were "classic signs and symptoms of a benzodiazepine drug," but probably not Rohypnol, unless there was a very

small dose, because it was undetected in Jacqueline's hair and urine. His opinion was based on Jacqueline's description of what she experienced to the police and others and assumed the veracity of her statements. These effects do not all occur together with just alcohol.

Toxicologist David Vidal opined that it was not surprising not to find Rohypnol in Jacqueline's blood more than 50 hours later, as a metabolite of that drug is in the blood for 12 to 18 hours after ingestion. He would not conclude that Rohypnol was not ingested. Metabolic Rohypnol would be found in urine 24 to 48 hours after ingestion depending on the dosage and other variables. GHB would be present in urine for only 18-24 hours. Jacqueline's urine sample was negative for Rohypnol, GHB and Ketamine. The lab tested for eight different members of the benzodiazepine family and the result was negative. It also screened for amphetamines, barbiturates, marijuana, cocaine, opiates and PCP, none of which were present.

Prior uncharged sexual misconduct

In October 2005, Rosemarie M., a teacher, frequented the same Starbucks. There, she met appellant. He did not mention that he was married. She gave him her telephone number. At some point, he telephoned her, said he was at a restaurant bar in Pasadena, and asked her to join him and his friends for drinks. She declined. An hour later, he called again and asked her to join him for coffee, which she accepted. At her suggestion, they met at a 7-Eleven near her home at 10:00 p.m. Rosemarie got into appellant's car, and he drove to a coffee shop, where he immediately asked if she wanted to go elsewhere to get an alcoholic drink. She said "no," and they chatted for a half hour and then left. Rosemarie found the meeting "very pleasant" and appellant someone she would want to date.

In appellant's car, as they were about to leave, appellant aggressively tried to kiss Rosemarie with his tongue and placed both his hands on her breast. He licked her face, his aggressive moves surprising her. She pushed him away, saying that she "was not that kind of girl." She told him to stop, and he did. Rosemarie admitted that if the kiss had been gentler, she would have kissed him.

As they drove back to the 7-Eleven, appellant stopped for a red light and again leaned over to kiss Rosemarie. She again pushed him away and said, "No." Appellant stopped. She was frightened and told him to "take [her] home." He gave her a gentle hug in the 7-Eleven parking lot, and she told him not to call her again. He never did. Rosemarie did not report the incident.

The defense's evidence

Dr. Ernest Lykissa, a forensic toxicologist, testified for the defense. He tested evidence and reviewed the prosecution's forensic experts' results. Lykissa opined that the passage of time after usage of a date-rape drug "improve[s]" the ability to detect its presence in Jacqueline's hair because it takes time to grow to where it can be cut. He examined Jacqueline's hair sample and did not detect a date-rape drug. He believed that the symptoms, such as anterograde amnesia, experienced by Jacqueline could have been caused by hypoglycemia, diabetic coma and alcohol, and not a date-rape drug. Lykissa would expect that evidence of a date-rape drug would be detected if tested within 50 to 54 hours of ingestion, and if it was not, it would mean that no date-rape drug was ingested. It can be detected in the urine up to a week.

Appellant testified. On the day of the charged offenses, Jacqueline texted him about Dodger tickets, and, in subsequent communications between them that day, suggested they "meet up later" for drinks in a "not so crowded" place. They agreed to meet at the Starbucks parking lot.

When they met, they drove 10 minutes in appellant's car to a bar that did not ask Jacqueline for identification. Appellant ordered beers for each of them, and Jacqueline drank the whole bottle of beer, except for a little left at the bottom. Appellant assumed she was old enough to drink because he had seen her drinking in a bar before. He denied putting anything in her beer. There was mutual attraction, so appellant suggested they go elsewhere because the band at the bar was too loud.

After purchasing vodka, soda and cups at a grocery store, appellant drove to his office building. They went into an office, and he poured drinks. He denied putting drugs into Jacqueline's drink. Jacqueline turned on the music, while holding her drink. After a

while, they walked down the hall to the rest room at Jacqueline's request. When they returned to the office, Jacqueline was "livelier," so appellant made the first move to kiss her. After taking another sip of her drink, Jacqueline began undressing and asking appellant about his sexual exploits. They kissed each other, and then Jacqueline removed her shirt. Appellant unbuttoned her pants without resistance, and she pulled them down. Appellant kissed her breasts and gave her oral sex on the floor. While he was doing so, she poured the remaining vodka from the bottle and "chugged the whole thing down." He removed his shirt and pants and had vaginal sex at her request. He inserted his finger a quarter of an inch into her anus until she told him that she did not like it. He then stopped. Appellant climaxed on her stomach. Jacqueline was conscious, never groggy or falling asleep, and at no time resisted.

At that point, Jacqueline seemed a "little drunk," and asked if appellant was married, having seen his wedding ring. He responded that maybe he was and maybe he was not. After resting there to sober up, they dressed. At 11:45 p.m., appellant said they should go. As they left the building, the alcohol seemed to have "hit" Jacqueline, as she had difficulty walking and leaned on him. Appellant put her in his car, returned to the office to clean up and then drove her to her car at Starbucks. He helped her into her car, and she banged her head on the roof. He told her he had to leave after sitting with her for one-half hour.

Appellant claimed that Jacqueline called him at 4:00 a.m. and left a message. At approximately 8:00 a.m. that morning, he returned the call and asked if she had a good time and had gotten home alright. She responded affirmatively. She said she was going to take a shower, and he should call her back later. When he did 15 minutes later, she asked if she was going to the Laker game. He said he did not know how many tickets he would have, and she might or might not go. She said, "What do you mean I'm not going," and her demeanor changed. She began challenging him. Appellant called her again at around noon and they spoke for half an hour. She was again challenging and wanted to know if she consented to having sex with him and why he did not use a condom. Appellant said he did not have one with him, and she had agreed it was alright.

At 10:00 p.m., on February 22, 2007, Jacqueline called appellant and said she was not sure the sex was consensual. Appellant told her it was consensual, that she undressed herself and that she said, "You're going to get it." She said okay and hung up.

Jacqueline called back five or 10 minutes later and asked appellant's name. He was "freaked out" because of what she said and told her his name was Solani, fearing she would show up at his house and speak with his wife and daughter.

Appellant claimed with respect to Rosemarie that he mistook her interest as romantic when he tried to kiss her. When he leaned over to kiss her, he accidentally brushed her breasts. When she told him to stop, he did. At a stop light appellant went to kiss her on the cheek to apologize, and she misinterpreted his intentions. She said no and pushed him away, and he stopped.

DISCUSSION

I. Sufficiency of the evidence

Appellant was convicted of rape by drug and sexual penetration by foreign object. With respect to each offense, the information alleged that Jacqueline "was prevented from resisting by an intoxicating, anesthetic, *and* controlled substance. . . ." (Italics added.) But the jury was instructed in accordance with CALJIC No. 1.23.2 that an essential element of each offense "is that the alleged victim was prevented from resisting the act by an intoxicating *or* anesthetic substance *or* any controlled substance."[3] (Italics

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[3] The full text of CALJIC No. 1.23.2, as given, is as follows: "In the crime charged in Counts 1 and 4 an essential element of the crime is that the alleged victim was prevented from resisting the act by an intoxicating or anesthetic substance or any controlled substance. 'Prevented from resisting' means that as a result of intoxication or having been administered or ingested an anesthetic or a controlled substance, the alleged victim lacked the legal capacity to give 'consent.' Legal capacity is the ability to exercise reasonable judgment, that is, to understand and weigh not only the physical nature of the act, but also its moral and probable consequences. [¶] In making this determination, you should consider all the circumstances surrounding the act, including the alleged victim's age and maturity. It is not enough that the alleged victim was intoxicated or impaired by the anesthetic or controlled substance to some degree, or that the intoxication or anesthetic or controlled substance reduced the person's sexual inhibitions. Impaired mentality may exist and yet the individual may be able to exercise reasonable judgment

added.) The disjunctive used in the instruction is consistent with the statutory language. The jury verdicts found appellant guilty of committing the charged offenses, but the jury failed to reach a verdict on the special allegation that "in the commission of the above offense, the defendant . . . administered a controlled substance, to wit, benzodiazepines, in violation of Penal Code Section 12022.75(b). . . ."

Appellant contends that there is insufficient evidence to support his convictions. He argues that there is no evidence that he administered a date-rape drug in order to overcome Jacqueline's resistance to his sexual advances because such a drug was not found in her blood, urine, or hair specimens. This contention is without merit.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) Reversal on this ground is unwarranted unless '"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin*, *supra*, at p. 331.) "'[T]he appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.] This standard applies whether direct or circumstantial evidence is involved." (*People v. Catlin* (2001) 26 Cal.4th 81, 139.) Given this court's limited role on appeal, appellant bears an enormous burden in claiming there was insufficient evidence to sustain the finding. If the finding is supported by substantial evidence, we are bound to give due deference to the trier of fact and not retry the case ourselves. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

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with respect to the particular matter presented to his or her mind. Instead the level of intoxication and the resulting mental impairment must have been so great that the alleged victim could no longer exercise reasonable judgment concerning that issue."

Section 261 provides in part: "(a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: [¶] . . . [¶] (3) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused." The intoxicant can be alcohol alone. (See *People v. O'Brien* (1900) 130 Cal. 1, 4–5.) Similarly, section 289, subdivision (e) defines sexual penetration by foreign object as the commission of "an act of sexual penetration when the victim is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused. . . ."

Jacqueline's testimony was sufficient to establish that she was unable to resist appellant's sexual advances. (Evid. Code, § 411 [testimony of one witness, if believed, may be sufficient to prove any fact]; *People v. Vega* (1995) 33 Cal.App.4th 706, 711.) Within 30 minutes after appellant poured her a drink, Jacqueline described feeling weak and numb, finding it difficult to stand when she went to the bathroom and experiencing increased numbness as she walked back to the office, forcing her to use the wall to support herself. Her vision became blurry. When she got to the office she sat down, and appellant attempted to kiss her with his tongue. She pushed him away, but he tried again. Jacqueline's arms felt heavy and she lacked the energy and strength to resist. She ended up on her back on the floor with appellant on top of her, lifting her sweater and bra, kissing her breasts. When she awoke in her car five or six hours later, Jacqueline had no memory of anything else, including appellant engaging in the charged conduct.

The more difficult question is whether there is sufficient evidence that Jacqueline's inability to resist appellant was the result of "any intoxicating or anesthetic substance, or any controlled substance." (§ 261, subd. (a)(3).) The difficulty arises from the fact that forensic testing failed to detect any benzodiazepine drug, including Rohypnol, in the blood, urine and hair specimens provided by Jacqueline. The benzodiazepines, and specifically Rohypnol, were the focus of the People's case. The

prosecution sought to explain the absence of any of those drugs as being the result of the more than 50-hour delay in providing the specimens.

Further, the jury was unable to agree that "in the commission of the [offense], the defendant . . . administered a controlled substance, to wit, benzodiazepines, in violation of Penal Code Section 12022.75(b). . . ." Given the evidence that only appellant gave Jacqueline a drink just before she experienced the effects, the jury's failure to find that he administered a benzodiazepine drug was likely due to the absence of a benzodiazepine in Jacqueline's body, as well as the testimony of the prosecution's expert, Kukoski, and the defense expert, Lykissa, that they would expect to find such a drug in her urine 50 to 52 hours after it had been ingested. We must therefore look for evidence of the intoxicant, anesthetic or controlled substance elsewhere.

Expert testimony established that there are numerous "date-rape" drugs that are not benzodiazepines. Examples include GHB, Hydrocodone (an opiate), and Ketamine. Kukoski testified that GHB is a major date-rape drug that is only detectable in urine for eight to 12 hours, far less than the more than 50 hours before Jacqueline's specimens were taken, there is no validated method to test for it in the hair, and it is produced by the body endogenously, and therefore found naturally in the body. Further, Lykissa, appellant's own expert, testified that he found hydrocodone in Jacqueline's hair sample, suggesting that it might be another potential culprit in causing Jacqueline's symptoms, which were classic date-rape drug symptoms.

Additionally, even if Jacqueline was not given a date-rape drug, her consumption of alcohol alone supports appellant's convictions. Section 261, subdivision (a)(3) is violated where the victim is prevented from resisting by "*any intoxicating or* anesthetic substance, *or* any controlled substance."[4] (Italics added.) The intoxicant can be alcohol alone. (See *People v. O'Brien, supra,* 130 Cal. at p. 5.) There was sufficient evidence from which the jury could conclude that the alcohol Jacqueline consumed, alone, or with

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4 Webster's Third New International Dictionary (2002) at page 1185 defines "intoxication" as "an abnormal state induced by a chemical agent."

other factors, was the source of her inability to resist appellant's sexual advances. While there was conflicting evidence regarding how much Jacqueline drank, there was evidence she had a beer, a 16-ounce cup of vodka and soda and "chugged" what remained in the vodka bottle. There was also evidence that she had an infection in her body, as reflected by the white, vaginal discharge, which expert testimony indicated could have exacerbated the effects of alcohol.[5]

Appellant argues that given the allegations in the information, alcohol consumption alone cannot support the jury's finding. The information alleges with respect to the charges of which appellant was convicted, that Jacqueline "was prevented from resisting by an intoxicating, anesthetic, *and* controlled substance. . . ." (Italics added.) Since the information alleges the items that could prevent resistance in the conjunctive, the offending chemical must be a controlled substance that is intoxicating and anesthetic. Alcohol is not a controlled substance. We do not agree.

In *O'Brien*, involving a conviction of rape by drugs, our Supreme Court stated: "The information was demurred to on the ground of uncertainty—the point of the objection being that the substance administered to the prosecutrix was alleged to be 'at once intoxicating, narcotic, and anesthetic,' . . . *It is well settled that* '*where the statute enumerates several acts disjunctively, which separately or together shall constitute the offense, the indictment, if it charges more than one of them, which it may do, and that, too, in the same count, should do so in the conjunctive*.'" (*People v. O'Brien, supra,* 130 Cal. at p. 3, italics added; *People v. Turner* (1960) 185 Cal.App.2d 513, 518.) "When a statute . . . lists several acts in the disjunctive, any one of which constitutes an offense, the complaint, in alleging more than one of such acts, should do so in the conjunctive to avoid uncertainty. [Citation.] Merely because the complaint is phrased in the conjunctive, however, does not prevent a trier of fact from convicting a defendant if the

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5 The jury findings are not inconsistent. The jury could have found the allegation that appellant administered to Jacqueline a benzodiazepine untrue but still administered another date rape drug or taken advantage of her when she could not resist because of her consumption of alcohol.

evidence proves only one of the alleged acts. [Citation.]" (*In re Bushman* (1970) 1 Cal.3d 767, 775, disapproved on other grounds in *People v. Lent* (1975) 15 Cal.3d 481, 486, fn. 1.) Thus, the jury was entitled to convict appellant if the evidence proved that Jacqueline was unable to resist appellant's sexual advances because she ingested a chemical within any one of the three categories of chemicals set forth in section 261, subdivision (a)(3).

II. Admission of prior sexual offense

Before trial, appellant filed a motion in limine to exclude evidence of an alleged prior uncharged sexual offense by appellant against Rosemarie on the grounds that there was no similarity between it and the charged crimes, the prior acts had not resulted in convictions, and the prejudice outweighed the probative value under Evidence Code section 352. The prosecutor argued that the prior conduct was similar to the charged conduct, was admissible under Evidence Code section 1108 and was not precluded by Evidence Code section 352. The trial court allowed the evidence under Evidence Code section 1108 because it met the definition of misdemeanor sexual battery, would not inflame the jury, was not more heinous than the charged conduct, would not consume an undue amount of time and was not remote.

Before Rosemarie testified about the incident, the trial court instructed the jury on the limited use of her testimony to show disposition.[6] After she testified, appellant

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[6] The instruction as given to the jury was as follows: "Evidence will be introduced through the testimony of witness Rosemarie . . . for the purpose of showing that the defendant engaged in a sexual offense other than that charged in this case. [¶] If you find that the defendant committed a prior sexual offense, you may but are not required to infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to infer that he was likely to commit and did commit the crimes of which he [is] also accused. [¶] However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. [¶] If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider along with all other evidence in determining whether the defendant has been proved guilty beyond a

moved to strike her testimony because it was not within Evidence Code section 1108, as the incident did not constitute a sexual battery.

Appellant contends that the trial court erred in allowing evidence of a prior uncharged alleged sexual offense, thereby depriving him of due process and a fair trial. He argues that "[a] crude pass on a date does not indicate a propensity to drug and rape someone," and therefore lacks relevance and probative value. While we agree with appellant that the trial court abused its discretion in admitting this evidence, we find the error to have been harmless.

The general rule against evidence of criminal propensity, as embodied in Evidence Code section 1101, subdivision (a),[7] is a long-standing one (*People v. Falsetta* (1999) 21 Cal.4th 903, 913 (*Falsetta*)), designed to insure that a defendant is convicted for what he has done, not for who he is. In the mid-1990's, the Legislature carved out an exception to this general rule for defendants charged with sex offenses. (Evid. Code, § 1108.)[8] Other similar misconduct was made admissible because of the critical need for this evidence "'given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial.'" (*Falsetta*, *supra*, at p. 911.)

But both the Legislature and the courts have been mindful of the potency of such evidence and risk that a jury might be tempted to convict a defendant for his past conduct although his current charges have not been proven beyond a reasonable doubt, thereby

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reasonable doubt of the charged crime. [¶] Unless you are otherwise instructed, you must not consider this evidence for any other purpose."

7 Evidence Code section 1101 provides in part: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

8 At the time of trial, Evidence Code section 1108 provided in part: "(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

implicating due process. To guard against this risk, the Legislature made admission of evidence of other misconduct permissible only if it "is not inadmissible pursuant to section 352" (Evid. Code, § 1108, subd. (a)), and the courts have determined that, at least in part, Evidence Code section 1108 is saved from due process defects because "section 352 affords defendants a realistic safeguard in cases falling under section 1108." (*Falsetta, supra,* 21 Cal.4th at p. 918.)

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "[T]he trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) "When the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge." (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) Abuse occurs when the trial court "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) "'[I]n most instances the appellate courts will uphold [the trial court's] exercise [of discretion] whether the [evidence] is admitted or excluded.'" (*People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1532.)

"'The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon mechanically automatic rules. . . . [Citation.]'" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 352.) In considering whether the probative value of prior sexual misconduct is outweighed by the prejudice, we evaluate the nature of the prior sex offense, its similarity to the charged offense, its relevance, the certainty of its commission, the inflammatory nature of the evidence, the probability of confusion, consumption of time, remoteness as

well as other unique factors presented. (*People v. Harris* (1998) 60 Cal.App.4th 727, 738–740; see also *Falsetta*, *supra*, 21 Cal.4th at p. 917.)

Here, less than a year and one-half before the charged incident, appellant met Rosemarie at the same Starbucks. He telephoned her and, after a few weeks of his attempts, she accepted his invitation to join him for coffee. They met, and Rosemarie got into appellant's car. He drove to a coffee shop, where they chatted for one-half hour and then left. In the parking lot, inside appellant's car, appellant aggressively tried to kiss Rosemarie with his tongue, placed both hands on her breast and licked her face. She pushed him away, saying that she "was not that kind of girl." When she told him to stop, he did.

As they drove back to the 7-Eleven where Rosemarie had left her car, appellant tried again to kiss her. She again pushed him away and said, "No." Appellant again stopped. She told him to "take [her] home." He gave her a gentle hug in the 7-Eleven parking lot, and she told him not to call her again. He never did. Rosemarie did not report the incident to the police.

The trial court abused its discretion in admitting this evidence. The evidence was admitted on the issue of appellant's propensity to drug, rape and commit other sexual offenses against a woman rendered by him unable to resist. The greater the similarity between the prior offense and the charged offense, the greater the probative value to establish propensity to commit the charged offenses. (*People v. Branch* (2001) 91 Cal.App.4th 274, 285.) Conversely, the less the similarity, the less probative the evidence on the issue of the defendant's disposition to commit the charged offense.

We see virtually no similarity, in nature or degree, between a man who stops his sexual advances on a date when requested to do so and a man who surreptitiously drugs, rapes and digitally penetrates a woman he has rendered unable to resist. Appellant's boorish conduct with Rosemarie is in no way probative of a propensity to drug and rape Jacqueline. The points of similarity between the two incidents referred to by respondent, such as appellant pretending to be unmarried, seeking late night drinks with women, meeting both women at the Starbucks where Jacqueline worked and the claimed close

temporal proximity of the incidents simply do not reflect a propensity to commit drug induced rape.

Having concluded that the prior incident had no relevance to appellant's disposition to commit the charged offenses, even the slightest prejudice would require excluding it. Introducing evidence of distasteful and inappropriate conduct by appellant, portraying him as an unwelcomed sexual predator, is prejudicial. Consequently, the prejudice outweighed the nonexistent probative value and mandated that the evidence be excluded.

We nonetheless find that error in admitting evidence of the prior incident to be harmless. We evaluate the prejudice caused by the erroneous admission of prior misconduct evidence under the *People v. Watson* (1956) 46 Cal.2d 818 standard that reversal is not compelled unless a result more favorable to the defendant would have been reasonably probable if such evidence were excluded. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018–1019.)

The Rosemarie incident, while offensive, was not inflammatory, particularly when contrasted with the charged offenses. The prior conduct reflected sexually overaggressive dating behavior that was stopped when requested. In contrast, the charges against appellant were for the most serious sexual offenses.

The nature of appellant's prior conduct was sufficiently distinct from the charged offenses, was against a different woman, and under different circumstances that it is unlikely that it would have confused the jury. Even though appellant was not charged or convicted of any crime related to the prior incident, given its minor nature, it is unlikely that the jury would feel a strong need or desire to punish him for it.

It took little time to present the evidence of the prior incident, consuming only a very small portion of the eight volumes of reporter's transcript. Because there was only minimal prejudice in admitting the prior incident, it is not reasonably probable that its exclusion would have resulted in a more favorable outcome for appellant. Also, the trial court admonished the jury of its limited use, that it was for the jury to determine whether

the incident with Rosemarie constituted a crime, and that evidence that appellant committed the prior offense alone was insufficient to support a guilty verdict.

III. Exclusion of evidence

Before trial began, the prosecutor filed an in limine motion (1) seeking to exclude the testimony of defense witnesses Luis Rosas and Robert Viramontes, who witnessed heavy drinking at the two Dodger games that Jacqueline attended, and (2) limiting cross-examination of the prosecution's witnesses relating to Jacqueline's drinking alcohol at any time before the charged incident. Defense counsel objected, arguing that appellant's relationship with Jacqueline was "a consensual relation[ship] with a woman [who was] drinking heavily," and the motion was an attempt to "strip my ability to effectively cross-examine this lady. And other times she's been with [appellant], drinking heavily such as these other two witnesses will testify about to a point I think one of them might say that she passed out."

Defense counsel made an offer of proof, stating: "I'd like to argue about why it is relevant to ask about prior alcohol consumption, and I don't think I've been heard on that unless the court anticipated my argument. This case is all about her going out for drinks, drinking, having sex and later claiming that she'd been drugged. To inquire about her use of alcohol and her consciousness and the effects of alcohol on herself, the effects of alcohol that she's aware of is totally relevant. I mean, she testified to what she felt after all the drinking. For me to not be able to inquire about her experience with alcohol, I believe that is a flat out violation of my ability to effectively cross-examine her and his right to inquire about her credibility."

The trial court ruled that the evidence would not be allowed.

A. Cross-examination of Jacqueline regarding past alcohol use

Jacqueline testified at appellant's preliminary hearing that she went to Dodger games with other Starbucks employees, with tickets given to them by appellant, who was also present. She testified that she did not drink beer at those games.

Appellant contends that the trial court erred in precluding cross-examination of Jacqueline regarding her past alcohol use and its effects on her, violating his state and

federal constitutional rights to due process, a fair trial, to present a defense and to confront and cross-examine the witnesses against him. He argues that "[t]he jury was entitled to know Jacqueline's experience with alcohol, and her reactions to alcohol. Given the prosecutor's overwhelming push for conviction based on Jacqueline's ingestion of a benzodiazepine drug, the jurors may have concluded there was insufficient evidence of drugs and Jacqueline's alcohol intake caused her symptoms."

We need not address this contention because we conclude that even if appellant was erroneously precluded from cross-examining Jacqueline on her prior alcohol use, the error was utterly harmless by even the most stringent beyond a reasonable doubt standard. (*People v. Lara* (1994) 30 Cal.App.4th 658, 676; *People v. Vargas* (2009) 178 Cal.App.4th 647, 662 ["'Confrontation clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24'"]; *People v. Farley* (2009) 46 Cal.4th 1053, 1104 [failure to allow complete defense].) Appellant testified that she "chugged" the vodka remaining in the bottle after he had poured a drink for each of them and that she had a lot to drink. As appellant's offer of proof in the trial court and argument here make clear,[9] the cross-examination of Jacqueline was aimed at trying to bolster appellant's testimony and establish that Jacqueline was a heavy drinker and that the effects she experienced at the time of the charged offense were the result of alcohol she voluntarily consumed, not a date-rape drug appellant surreptitiously slipped into her drink.

Even if the trial court had allowed admission of the proffered evidence, it would not have helped in appellant's defense. It would only tend to prove that Jacqueline's inability to resist appellant was caused by alcohol intoxication, rather than a date-rape drug. Both charges of which appellant was convicted required a showing that Jacqueline was "prevented from resisting by any *intoxicating or* anesthetic substance, or any controlled substance. . . ." (§ 261, subd. (a)(3), italics added.) Alcohol is an intoxicant

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9 Appellant argues in his opening brief that, "The defense was a consensual relationship with a woman who was drinking heavily."

under the statute. (See *People v. O'Brien, supra,* 130 Cal. at p. 5.) Thus, evidence that Jacqueline was a heavy drinker who may have in the past passed out from alcohol would have aided in the case against appellant, not provided him with a defense. He did not have to administer the alcohol against Jacqueline's will to be guilty of rape by drug, so long as her condition was "known, or reasonably should have been known by the accused."[10] (§ 261, subd. (a)(3).) Given the dramatic symptoms exhibited by Jacqueline, appellant knew or reasonably should have known of her impaired condition when he took advantage of her.

B. Defense witnesses on Jacqueline's past alcohol use

Appellant contends that he was denied his rights to present a defense, to due process, to counsel and to a fair trial by the trial court's ruling prohibiting him from calling Luis Rosas and Robert Viramontes to testify. He argues that their testimony regarding prior incidents of Jacqueline's heavy drinking "went directly to a disputed element of the charged offenses."

Despite the Sixth Amendment right to present a defense, the trial court has wide discretion to limit defense evidence. (*Delaware v. Van Arsdale* (1986) 475 U.S. 673, 679; *People v. Smith* (2007) 40 Cal.4th 483, 513.) For the same reasons and by the same analysis set forth in the preceding section, we need not decide this issue because if there was any error it was utterly harmless beyond a reasonable doubt. (*People v. Lara, supra,* 30 Cal.App.4th at p. 676.) The excluded evidence would not have assisted any defense by appellant, and therefore did not infringe on his right to present a defense.

Because appellant's counsel raised this claim in the trial court and did all that he could, within the confines of the trial court's ruling, to present the evidence, his performance was not defective and therefore did not constitute ineffective assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668.)

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10 In any event, appellant aided and abetted in her consumption of alcohol as she was under the drinking age, and he purchased the alcohol for her.

IV. Stay of execution under section 654

Jacqueline testified that appellant told her on the phone that he had sexual intercourse with her "on the spur of the moment." When he described the incident, he said that he got her on the floor and gave her oral sex. He then "moved from giving her oral to her giving [him] oral for a little bit." He then "moved down and [they] just began to have sexual intercourse." Jacqueline asked to switch positions so she was on top of him. He asked her if she "liked this, . . . and [he] kind of grabbed her cheeks . . . and kind of just like pulled them a little bit to the side and she goes, 'Oh, that feels great.' [He] said, 'Okay. Well, tell me if you like this,' and that's when [he] used [his] finger to just kind rub around her butt hole." She told him she did not like it and he stopped. She then asked to switch again so he was on top.

Appellant was convicted of rape by drugs and sexual penetration by foreign object. The trial court sentenced him to the middle term of six years on the rape conviction and to a consecutive term of two years, or one-third the middle term, on the sexual penetration by foreign object conviction.

Appellant contends that the trial court erred by failing to stay execution of the sentence for sexual penetration by foreign object pursuant to section 654. He argues that both acts occurred simultaneously and neither was accomplished by force or violence. This contention is without merit.

Section 654 provides in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, *but in no case shall the act or omission be punished under more than one provision*." (§ 654, subd. (a), italics added.) A course of conduct that constitutes an indivisible transaction violating more than a single statute cannot be subjected to multiple punishment. (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1248.) "If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) If, on the other hand, "the [defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other,

he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) Section 654 turns on the defendant's objective in violating both provisions, not the Legislature's purpose in enacting them. (*People v. Britt* (2004) 32 Cal.4th 944, 952.) Whether a course of conduct is divisible and therefore gives rise to more than one act depends on the "'intent and objective'" of the actor. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267.)

Whether multiple convictions were part of an indivisible transaction is primarily a question of fact. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.) We review such a finding under the substantial evidence test (see *People v. Osband* (1996) 13 Cal.4th 622, 730–731); we consider the evidence in the light most favorable to respondent and presume the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Holly* (1976) 62 Cal.App.3d 797, 803.) We must determine whether the violations were a means toward the objective of commission of the other. (See *People v. Beamon*, *supra*, 8 Cal.3d at p. 639.)

The California Supreme Court in *People v. Perez, supra,* 23 Cal.3d 545 held that the defendant could be separately punished for separate sex offenses against the same victim in a single transaction. "[F]ocus[ing] on the question whether defendant should be deemed to have entertained single or multiple criminal objectives" (*id*. at p. 552), the court rejected the defendant's argument that he had but a single objective in committing each sex offense—to obtain sexual gratification. "Such an intent and objective is much too broad and amorphous to determine the applicability of section 654. . . . To accept such a broad, overriding intent and objective to preclude punishment for otherwise clearly separate offenses would violate the statute's purpose to insure that a defendant's punishment will be commensurate with his culpability." (*Ibid*.) A defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act. The court concluded: "We therefore decline to extend the single intent and objective test of section 654 beyond its purpose to preclude punishment for each such act.

[Citation.]" (*Id.* at p. 553.) Section 654 does not preclude separate punishment for multiple counts of sexual offenses arising from the same criminal venture where each offense is a separate and distinct act and was not incidental to or the means by which any other offense was accomplished. (See *People v. Hicks* (1965) 63 Cal.2d 764; see also *In re McGrew* (1967) 66 Cal.2d 685; *People v. Slobodion* (1948) 31 Cal.2d 555.)

People v. Madera (1991) 231 Cal.App.3d 845 is instructive. There, the Court of Appeal found that sexually fondling or rubbing the victim's penis before orally copulating him was not subject to section 654 because the specific offense of oral copulation was capable of commission without the rubbing. (*People v. Madera*, *supra,* at p. 855.) The court applied section 654 where the "undefined sex act directly facilitates or is merely incidental to the commission of a defined lewd act." (*People v. Madera*, *supra*, at p. 855.) The example it used was where lubricant was applied to the area to be copulated. In such a situation the commission of the undefined act would have directly facilitated the commission of the defined act. (*Ibid*.) The court stated: "[S]ection 654 does not apply where, as here, the undefined act is 'preparatory' only in the general sense that it may be intended to sexually arouse either the perpetrator or the victim." (*Ibid*.) The fondling in that case was neither necessary nor incidental to the oral copulation.

Appellant's digital penetration and rape of Jacqueline are not subject to section 654. Neither act facilitated or was preparatory of the other. They were separate crimes that were unnecessary precursors to each other. Each was motivated by a separate objective. Appellant initiated the sexual encounter when Jacqueline returned from the bathroom for the obvious purpose of sexually gratifying himself, as reflected by his ejaculation on her stomach. But during the incident, he evidenced a separate and distinct objective of gratifying Jacqueline. He stated, after pleasing her when he "grabbed her cheeks," and just before placing his finger in her anus, "Well, tell me if you like this."

A defendant who rapes a woman and further humiliates and defiles her with other sex violations is more culpable than one who only rapes the woman. Defendant's digital penetration and rape of Jacqueline provided independent and additional sexual

gratification and inflicted significant additional indignation and humiliation on her, warranting additional punishment.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ